

REMARKS

In the Office Action mailed January 6, 2010 from the United States Patent and Trademark Office, claim 40 was rejected under 35 U.S.C. § 102(a) as being anticipated by Zhang. The previously-submitted declarations were found not persuasive as lacking accompanying evidence. Submitted herewith are declarations under 37 C.F.R. §§ 1.131 and 1.132 by Applicants regarding the dates of reduction to practice of the claimed invention.

The instant application claims priority to provisional application serial number 60/422,535 filed on October 31, 2002. The newly-cited prior art has a priority date of October 22, 2002, just nine days prior to the filing of Applicants' provisional application.

The declarations under 37 C.F.R. §§ 1.131 and 1.132 establish that the claimed invention was reduced to practice in production form and sold at least as early as September 2002, which is prior to the priority date of October 22, 2002 of the Zhang reference.

Specifically, the declaration of one of the inventors, Joe Galloway, establishes that the invention was reduced to practice in production form at least as early as September 4, 2002, when sales occurred. The declarations include true copies of invoices showing at least six sales and shipments of Asyra devices embodying the invention between September 4, 2002 and September 10, 2002. The declarations further reference the provisional filing to which this application claims priority and show that the referenced provisional application includes the Operator's Manual for the Asyra device that was the subject of the invoices. The declarations indicate that the Operator's Manual accompanied such sales.

The declarations of the inventors further establish that the photographs shown in the Operator's Manual at numbered pages 5-7 (as submitted in the provisional application) are true photographs of the Asyra device that had been reduced to practice at the time the photographs were taken and incorporated into the Operator's Manual. Such photographs are therefore further evidence that the claimed invention had been reduced to practice as of the time of shipment of the Operator's Manual with the invoiced shipments from September 4, 2002 to September 11, 2002.

Finally, the declaration of Michael F. Krieger states that a copy of the Operator's Manual that was included in the provisional filing has been in the possession of his law firm since prior to filing of the provisional application. The declaration further states that the copy includes a compact disk (CD) storing a true PDF copy of the Operator's Manual, and that the PDF copy includes the pictures of the Asyra device. The declaration states that the "last edited" date on the PDF copy of the Operator's Manaul as stored on the CD is September 14, 2002. This evidence shows that the photographs of the completed and reduced-to-practice Asyra device as contained in the PDF copy of the Operator's Manual were taken at some time on or prior to September 14, 2002. As an inventor has declared that the pictures are true pictures of finished devices embodying the invention, the CD copy stands as further evidence that the invention had been reduced to practice no later than September 2002.

The evidence thus establishes a reduction-to-practice date that predates the priority date of Zhang. Therefore, in light of the attached declarations, Applicants respectfully submit that

Zhang is not prior art under 35 U.S.C. § 102(a) and that the rejection should therefore be withdrawn.

CONCLUSION

Applicants submit that no new matter has been added and that the claim is now in condition for allowance. Accordingly, Applicants request favorable reconsideration. If the Examiner has any questions or concerns regarding this communication, the Examiner is invited to call the undersigned.

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Respectfully submitted,

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